COMMONWEALTH of VIRGINIA

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MEMORANDUM

TO: State Water Control Board Members

FROM: Melanie D. Davenport, Water Division Director

DATE: August 30, 2011

SUBJECT: Request to Adopt Final Amendments to the Regulations Pertaining to Biosolids: the Virginia Pollution Abatement (VPA) Permit Regulation (9 VAC 25-32-10 et seq.), the Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation (9VAC25-31-10 et seq.), and the Fees for Permits and Certificates (Fee) Regulation (9VAC25-20-10 et seq.)

Introduction

At the September 22, 2011 meeting, the staff intends to bring to the Board a request to accept as final, proposed amendments of regulations pertaining to biosolids. The regulatory action includes:

1) the Fees for Permits and Certificates (Fee) Regulation (9VAC25-20-10 et seq.)
2) the Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation (9VAC25-31-10 et seq.), and
3) the Virginia Pollution Abatement (VPA) Permit Regulation (9 VAC 25-32-10 et seq.)

When the Biosolids Use Regulations (12VAC5-585) were transferred from the State Board of Health to the State Water Control Board in a final exempt action on September 25, 2007, the pertinent sections of the Biosolids Use Regulations were incorporated into the Fee, VPDES and VPA regulations. Only non-substantive changes were made at that time in order to accommodate a transfer in administration only. The current regulatory action is being proposed to address further changes needed following the transfer.

Statutory Authority

The legal basis for the Fees for Permits and Certificates regulation (9 VAC 25-20-10 et seq.), the Virginia Pollutant Discharge Elimination System Permit Regulation (9 VAC 25-31-10 et seq.) and the Virginia Pollution Abatement Permit Regulation (9 VAC 25-32-10 et seq.) is the State

Water Control Law (Chapter 3.1 of Title 62.1 of the Code of Virginia). Virginia Code § 62.1-44.15 authorizes the State Water Control Board to promulgate regulations necessary to carry out its powers and duties. Specifically, §62.1-44.19:3 requires the State Water Control Board to include in regulation certain requirements pertaining to land application of sewage sludge.

Background

On January 1, 2008 the Virginia Department of Environmental Quality (DEQ) assumed regulatory oversight of all land application of treated sewage sludge, commonly referred to as biosolids. This change in oversight of the Biosolids Use Regulations from the Virginia Department of Health (VDH) to DEQ was at the direction of the 2007 General Assembly, which voted to consolidate the regulatory programs so that all persons land applying biosolids would be subject to uniform requirements, and to take advantage of the existing compliance and enforcement structure at DEQ. In addition to directing that DEQ manage the biosolids program, the General Assembly also added additional requirements regarding biosolids permitting and management.

At its September 25, 2007 meeting, the Board voted to adopt as a "final exempt" regulatory action the transfer of the existing substantive content of the VDH Biosolids Use Regulations into the VPA, VPDES, Fee, and Sewage Collection and Treatment (9VAC25-790) regulations. Following this action, DEQ initiated the full regulatory process to address a number of issues. These included outstanding VDH regulatory actions, questions regarding public notice processes, processes to establish appropriate buffers to address health concerns, permit issuance and modification procedures, sampling requirements, nutrient management requirements, animal health issues associated with grazing, and financial assurance procedures.

Also, an expert panel was convened by the Secretary of Health and Human Resources and the Secretary of Natural Resources, pursuant to House Joint Resolution 694 of the 2007 Acts of Assembly, to explore the health and environmental implications of biosolids use. The final report of the panel was published on December 22, 2008 as House Document No. 27. This regulatory action also considered the Panel's report and recommendations.

Notice of Intended Regulatory Action and Technical Advisory Committee

A Notice of Intended Regulatory Action (NOIRA) was published in the Virginia Register of Regulations on June 23, 2008. DEQ utilized the participatory approach by forming an ad hoc technical advisory committee (TAC) that held nine (9) public noticed meetings (October 3, 2008; November 3, 2008; January 9, 2009; February 13, 2009; March 20, 2009; April 24, 2009; May 22, 2009; August 20, 2009; and September 22, 2009); in addition, a financial assurance subcommittee held two (2) meetings on March 11, 2009 and April 21, 2009. A list of the members of the TAC is included as **Attachment A** to this memo.

Proposed Regulation and Public Comment

Based on the input of the TAC, DEQ prepared proposed amendments to the regulations. On December 14, 2009, the Board voted to proceed to public comment and hearing on these proposals. Following Board approval, the Department of Planning and Budget completed an

economic impact review on February 19, 2010. The Secretary of Natural Resources granted approval of the proposed regulatory amendments on June 22, 2010, and the Governor approved the amendments on January 14, 2011.

DEQ published the proposed amendments in the Virginia Register on February 28, 2011. A 60 day public comment period followed, ending on April 29, 2011. During the comment period, DEQ hosted four (4) public hearings (Lynchburg on March 31, Henrico on April 5, Bridgewater on April 7, and Bealeton on April 12). Messrs. Shelton Miles and Robert Dunn served as hearing officers.

DEQ received 181 written comments and at the 4 public hearings, 107 oral statements. DEQ staff sorted those comments and extracted individual topics addressed by each commenter, resulting in over 1,100 individual comments. The predominant subject addressed in the comments was buffers (setback distances) from homes, property lines, surface waters and other features. Numerous comments were also received on public notice, sampling and testing, general support and opposition of land application, nutrient management, storage, landowner agreements, and health, among others. While the comments overall were generally split between opposition to and support of biosolids land application, the speakers at the public hearings were predominantly farmers in support of the practice and opposed to more stringent regulation. A complete summary of public comment and DEQ's response to those comments is included as **Attachment B** to this memo.

Final Amendments to the Regulation

In response to public comment, DEQ made additional changes to the proposed amendments. Although not required under public involvement procedures in the Administrative Process Act, DEQ reconvened the TAC after the proposed changes. All original TAC members were invited, although the three citizen members who resigned from the original TAC declined to participate. This TAC meeting was held on June 24, 2011. In response to TAC comments, DEQ made additional changes to the proposed regulation.

The Attorney General's office also reviewed the regulation and suggested other changes which DEQ incorporated into the regulation. The Attorney General is reviewing the final regulatory amendments and a letter of statutory authority is expected prior to the September 22 Board meeting.

The following is a synopsis of the final DEQ modifications regarding selected topics which received a high degree of interest from the public. A comprehensive summary of all changes made to the regulation since proposed is included as **Attachment C** to this memo.

Setback distances from homes and property lines

The topic most discussed by commenters was the buffer, or setback distance, from homes and property lines. In the proposed regulation, DEQ incorporated guidance established for setbacks from homes and property lines into the regulation. This guidance, developed in concert with VDH, established a procedure whereby the standard setback distance from an adjoining occupied

dwelling home is 200 feet and 100 feet from a property line. An adjoining resident or landowner can request that the setbacks be doubled in distance to 400 feet from an occupied dwelling and 200 feet from a property line. This extension would be granted "upon request" by the owner or occupant, without a requirement to verify existence of any medical condition.

The primary focus of comments regarding residence and property line setbacks received from farmers, land appliers and wastewater treatment facilities stated that: 1) the length of the setbacks were not scientifically based; 2) the extended setback distance was only established for administrative convenience; 3) the setback procedure did not conform with the consensus of the TAC; 4) the additional setback request should be evaluated on the basis of the purpose of the request instead of being granted upon request; 5) the ability to request a setback extension on the same day as land application potentially presents a significant operational problem to land appliers and farmers; 6) the additional cost of fertilizing the area in the setback is potentially a hardship to farmers and could limit farm productivity; and 7) the increased distance could eliminate some smaller farms from being able to receive biosolids.

The primary focus of comments from citizens concerned about the use of biosolids stated that: 1) the length of the setbacks are not scientifically based; 2) there is no evidence the setback distances are protective of health, resulting in potentially not satisfying a statutory mandate; and 3) some selective studies have indicated odor from biosolids can travel approximately 1500 feet; thus, setbacks should be larger.

While the setback language in the regulation has been clarified, DEQ does not propose significant changes to the residence or property line setback distances. This is due to the fact that the distances and justification for extension to protect public health is based upon guidance from physicians at VDH with experience in evaluating biosolids setback extension requests. The distances proposed by VDH are based upon the science related to transmission of pathogens, with the addition of a safety factor intended to provide an abundance of caution for those persons whose immune systems have been compromised by illness or other medical conditions.

In its 2008 Report to the Governor and the General Assembly (House Document No. 27), the Governor's Expert Panel on Biosolids stated the following:

> *In early discussions, the Panel agreed that addressing the questions surrounding citizen-reported health symptoms should be its highest priority. In the past 18 months, the Panel uncovered no evidence or literature verifying a causal link between biosolids and illness, recognizing current gaps in the science and knowledge surrounding this issue. These gaps could be reduced through highly controlled epidemiological studies relating to health effects of land applied biosolids, and additional efforts to reduce the limitations in quantifying all the chemical and biological constituents in biosolids. While the current scientific evidence does not establish a specific chemical or biological agent cause-effect link between citizen health complaints and the land application of biosolids, the Panel does recognize that some individuals residing in close proximity to biosolids land application sites have reported varied adverse health impacts.*

Regarding odor and health impacts:

The Panel recognizes that odors from biosolids could potentially impact human health, well being and property values, but could not confirm such an impact or the extent of such an impact based on the current body of scientific literature and information presented directly to this Panel.

Historically, VDH responded to reports of adverse health impacts by doubling the setback distances from residences or property lines. VDH did this in conformance with state law and regulations in place at the time. DEQ's proposal to continue the practice of doubling the setback distances, albeit in a different administrative fashion, represents conformity with previous VDH practice and a regulatory precedent that was demonstrated by VDH to be protective of human health and thus statutory requirements. Additionally, DEQ has proposed that odor control plans be required when biosolids are land applied in order to reduce the potential for odor to impact human health.

With respect to the administrative procedure proposed to grant setback extensions upon request, DEQ proposed this procedure based on TAC discussions. When the VDH representative on the TAC suggested all residence and publicly accessible property line buffers be extended based on the difficulty in ensuring all persons with certain medical conditions were identified, the TAC discussed options to address the time lag necessary to evaluate a newly identified health complaint. The concept of granting a standard buffer extension "upon request" rather than a time consuming and unpredictable evaluation process that potentially affects land application operations was generally agreed upon as a reasonable compromise.

With respect to a buffer extension request received after biosolids has been delivered to the field, DEQ responded to a recommendation from the reconvened TAC and included a limitation on the buffer extension request specifying that any such request must occur to DEQ at least 48 hours prior to the commencement of land application. The request must then be communicated to the permittee at least 24 hours prior to land application, unless a request to extend the buffer is received from VDH. DEQ will add this requirement as a permit special condition that establishes this procedure at the time of permit issuance.

To address concerns voiced regarding setbacks from schools, hospitals and other such facilities DEQ added a minimum setback requirement from these "odor sensitive receptors" (defined in the regulation) to be a minimum of 400 feet. The setback from publicly accessible property lines is proposed to be 200 feet. These setbacks are also based on guidance from VDH.

Concerns were expressed about the cost of fertilizing farmland, the inability to fertilize setback areas and the need to substitute alternative fertilizers for these areas. Although there is a benefit to the use of currently "free" fertilizer, the inability to use biosolids in setback areas is potentially offset by the reduced cost of fertilizer in the areas that do receive biosolids as well as the administration of a standard and predictable setback extension procedure. In addition, some commenters expressed concern that some small fields may be ineligible for biosolids application due to setback distances. It is likely that some areas and farm configurations are not optimally situated to take full advantage of fertilization with biosolids.

Notification

Significant comments were received from the public that notification prior to application needs to be clarified and improved. DEQ made additional changes in response to these comments. Effective notification procedures, particularly at the time of permitting, will facilitate the implementation of the setback extension procedures.

Section 62.1-44.19:3.K. of the Code of Virginia specifies that "at least 100 days prior to commencing land application of sewage sludge at a permitted site, the permit holder shall deliver or cause to be delivered written notification to the chief executive officer or his designee for the local government where the site is located." The procedure for the 100 day notification prior to land application is clarified to be a one-time notification to the locality that may be accomplished when the permit application is received and DEQ notifies the locality of receipt of the permit application.

Section 62.1-44.19:3.K. of the Code of Virginia specifies that "the permit holder shall deliver or cause to be delivered written notification to the Department at least 14 days prior to commencing land application of sewage sludge at a permitted site." The regulatory requirements for this 14-day notification have been made identical to the statutory requirements. The list of other information required with the 14 day notice has been removed, as DEQ has found that in practice, permit holders do not have specific information about pending land application activities at this time. Alternatively, permit holders typically provide a significant amount of general information in order to satisfy the 14 day notice requirement, including a listing of all land application sites in a county, rather than only those where land application would definitely take place.

Because the land appliers will have more complete information nearer the time of land application, and in order to provide a more definitive notification process, DEQ has proposed that the permit holder provide written notification to DEQ and the locality when signs are placed 5 business days prior to land application. This notification will include specific identifying information for the subject sites, including that previously required in the 14 day notice.

DEQ also made changes to the proposed mandatory daily notice prior to land application. The daily notice requirement has been modified to occur no more than 24 hours prior to biosolids being delivered or land application commencing at a permitted site. The notice can only include sites where land application will occur or biosolids will be delivered in the following 24 hours and must also include identification of the biosolids source.

Signage

DEQ received comments that signs identifying a land application site are often inadequately placed. DEQ modified the requirements to state that a sign must always be posted at or near the intersection of the public right of way and the main site access road or driveway to a land application site. If a field is located adjacent to a public right of way, signs shall also be posted along each public road frontage beside the field to be land applied.

Signs must be posted at least 5 business days prior to land application and remain at the site for at least 5 business days following land application.

Most land application sites are private property for which public accessibility is limited. For sites where circumstances of increased public accessibility exist, the regulations specify that alternative posting options can be required. This could include a special condition specifying additional post-application signage requirements to educate the public regarding the access restrictions.

Environmental setback distances

DEQ received many comments voicing concern over the level of environmental protection for surface waters. The setback from surface waters has been modified to be consistent with the state and federal Concentrated Animal Feeding Operations (CAFO) regulations, whereby a 100 ft setback is required unless a 35 ft vegetated buffer is present. A definition for "vegetated buffer" has been added to both the VPA and VPDES regulations that is also consistent with the CAFO regulations. This requirement encourages the establishment of vegetated buffers adjacent to surface waters, which also promotes nutrient reduction goals established by the Chesapeake Bay Watershed Implementation Plan and other Total Maximum Daily Load (TMDL) implementation plans.

In response to comment regarding setbacks from other environmental features, DEQ increased the setback from open sinkholes to 100 ft (consistent with a well). A note has been added that specifies the 50 ft setback from a closed sinkhole can be reduced or waived by DEQ following evaluation by a professional soil scientist.

Other environmental setback language was revised for clarity based on comments related to the use of commonly used terms to identify surface water pathways. The provision for DEQ to increase any setback based on site-specific conditions remains.

Slope restrictions

DEQ received numerous comments that biosolids could effectively be used to help stabilize slopes in excess of 15%. In response, DEQ added a provision specifying that DEQ may waive the restriction on land application of biosolids to slopes exceeding 15% if the biosolids are being used for the purposes of establishment and maintenance of perennial vegetation. Such a waiver may also be based on other site specific criteria and BMPs that offer adequate environmental protection.

Sampling and Analysis

Significant comment was received expressing concern that the proposed regulations should require sampling and analysis of additional analytical parameters. Comment was also received that DEQ should remove any broad sampling and analysis requirements that included parameters not required by federal regulation, or that did not have specified regulatory limits.

In response to these comments, DEQ retained the regulatory provision that additional sampling and analysis may be required for site-specific or unusual circumstances, but did not add any additional analysis requirements. The regulation maintains broad site-specific authority to request additional information in cases where additional scrutiny is warranted. If evidence that elevated levels of a problematic constituent exist, sampling may be required by DEQ.

With respect to constituents found in the most recent EPA Targeted National Sewage Sludge Survey (TNSSS), EPA does not have information at this time indicating a necessity to restrict application rates or modify the current acceptable limits for land applied biosolids. EPA states that "the results presented in the TNSSS Technical Report do not imply that the concentrations for any analyte are of particular concern to EPA. EPA will use these results to assess potential exposure to these contaminants from sewage sludge." Although presence of certain targeted analytes was detected, EPA states that "it is not appropriate to speculate on the significance of the results until a proper evaluation has been completed and reviewed." DEQ will continue to monitor EPA technical surveys to determine if any program changes are appropriate for the Virginia biosolids program.

Molybdenum

The proposed regulation contained a land application limitation for biosolids with molybdenum (Mo) levels greater than 40 ppm. Such material was restricted from application on land used for grazing. EPA research has shown that biosolids with levels greater than this are at a higher risk to cause a copper (Cu) deficiency in grazing animals.

DEQ received comment that a lower ceiling limit for molybdenum was premature, as EPA has not yet changed the value in the federal regulation. DEQ has delayed action pending EPA adoption of a molybdenum standard.

DEQ retained the 75 ppm ceiling concentration for Mo, but replaced the 40 ppm restriction for biosolids applied to grazed lands with a footnote describing EPA's research and the potential risk of application of biosolids with Mo levels greater than 40 ppm. This information will be included in the fact sheet provided to the landowner.

Nutrient Management Requirements

DEQ received comments indicating that the standards for nutrient management were addressed in regulations promulgated by the Virginia Department of Conservation and Recreation (DCR), and were thus applied uniformly in nutrient management plans (NMPs) prepared by DCR certified planners.

In response to these comments, DEQ removed plant available nitrogen application rates and timing limitations for soybeans, tallgrass hay, warm season grasses and alfalfa in order to provide a uniform basis within the DCR nutrient management standards and criteria.

Comments were also received requesting that specifications for application of lime and potassium be removed for the same reason, that DCR regulations specified recommendations for

these nutrients. DEQ retained the requirement for lime and potassium supplementation, as these practices are not related to nutrient rate or time of year, but rather to unique operational characteristics associated with permitted biosolids land application activity.

Soil pH and Potassium

A number of comments were received from farmers that the requirement to have soil pH and potassium levels at a minimum level in the soil prior to application was not practical. Establishment of newly cleared ground was given as an example.

DEQ modified these requirements to specify that the land must be supplemented with the recommended agronomic rate of lime or potassium prior to or during biosolids land application.

Storage

DEQ received comments that the requirements for staging of biosolids at a site prior to land application were unclear. Staging has been defined as "the placement of biosolids on a permitted land application field, within the land application area, in preparation for commencing land application or during an ongoing application, at the field or an adjacent permitted field." Staging is not defined as storage. Comments were also received that the time period whereby biosolids could be delivered to a site and not immediately land applied was too long.

DEQ modified the proposed regulation to clarify that the "staging period" was to be no longer than 7 days, and the biosolids must be covered if conditions do not allow land application by the 7th day. DEQ also proposes adding a requirement specifying that biosolids shall not be staged within 400 feet of an occupied dwelling and 200 feet of a property line unless waived through written consent of the occupant and landowner.

In response to comments, DEQ also clarified that on-site storage requirements only apply to sites not located at a wastewater treatment plant. Additionally, biosolids stored at a permit holder's site may be land applied to any permitted site, not just those permitted by the holder of the permit for the on-site storage facility.

The proposed regulations specify that facilities designed to store dewatered biosolids must be covered. The reconvened TAC had questioned whether or not these proposed requirements would apply to existing structures, or only those constructed after the effective date of the permit. In response, DEQ added a clarifying statement that all on-site and routine storage facilities must meet the requirements specified in the regulation within 12 months of the effective date of the final regulation. DEQ also clarified that existing facilities designed to hold liquid or dewatered biosolids (and thus designed to hold runoff) could continue to be used to store dewatered biosolids, within permitted parameters.

Landowner Agreements

Public concern regarding landowners' knowledge of biosolids applications to their property was evident in a number of comments. In response, DEQ added a requirement specifying that the

most recently approved version of the landowner agreement form must be used for each permit application submitted, and that the form clearly identify the land application sites for which permission is being granted. In addition, a requirement has also been added that the landowner acknowledge receipt of a biosolids fact sheet approved by DEQ.

Some commenters expressed concern about education of those persons purchasing land on which biosolids had been applied, and suggested that DEQ require that notification be established in the deed to the property. State Water Control Law does not specify that DEQ has the authority to require deed notifications or restrictions. DEQ added requirements that the permit holder obtain a landowner agreement that requires the existing landowner to convey any applicable site restrictions related to land applied biosolids to the new landowner.

Financial Assurance

DEQ received public comment regarding the adequacy of the verification of financial assurance. A statement has been added clarifying that for financial assurance demonstrated through liability insurance, a pollution policy as well as a general liability policy is required that covers storage, transport, and land application of biosolids. Additionally, a measure of the financial stability of the insurance carrier is required in that the carrier must meet specified AM Best, Standard & Poor, or Moody ratings.

Comments were also received requesting that local government entities land applying biosolids under a VPDES permit be exempt from the requirements to demonstrate financial assurance. The Code of Virginia explicitly mandates that all permit holders authorized to land apply biosolids must demonstrate financial assurance, and the procedures prescribed in the regulation are consistent with other Department programs.

Permit application materials

DEQ received comments that land application sites were not properly identified in some past permit applications. In response to this concern, DEQ added a requirement for tax maps and associated tax parcel identification numbers, an aerial photograph of the proposed land application site, and a map identifying occupied dwellings and publicly accessible properties within 400 feet of the proposed land application site. These additional materials will help ensure all parcels are accurately identified in the permit application, as well as serving as a cross reference to landowner agreements which are required to include tax parcel identification numbers.

The requirement for additional soil characterization information for frequent applications of biosolids has been removed. Biosolids applications at greater than 50% of the agronomic rate more often than once every three years will require a DCR approved NMP, and the soils information will be evaluated in that process. Additionally, groundwater monitoring is not expected to be required for land application conducted in accordance with an NMP.

The requirement for a Land Application Plan (LAP) submittal at the time of permitting has been removed. All additions of land will necessarily be required to follow the notification procedures

outlined in statute. Therefore, the information in the LAP is irrelevant at the time of permit application.

Fees

DEQ received comment that the fee structure proposed in the regulation for biosolids permits was not consistent with statutory requirements.

In response, DEQ adjusted the requirements to align as closely as possible with the statutory requirements in §§ 62.1-44.19:3.F. and 62.1-44.15:6. of the Code of Virginia. For VPDES permits, the initial permit fee will include an additional $5000 for processing of the biosolids portion of the permit. Annual maintenance fees will not increase over that prescribed in 62.1-44.15:6. Any addition of land will be subject to a $1000 modification fee, whether added during the term of the permit or at reissuance. This includes additions of less than 50% of the originally permitted acreage.

For VPA permits, the initial permit fee remains at $5000 for a 10 year term. Annual maintenance fees will be reduced to $100 per year ($1000 maximum reissuance fee prescribed in § 62.1-44.19:3.F. divided by permit term of 10). Any addition of land will be subject to a $1000 modification fee, whether added during the term of the permit or at reissuance. This includes additions of less than 50% of the originally permitted acreage.

Biosolids application tonnage fees have not changed from those prescribed in the proposed regulation. Land application of Class B biosolids will incur a fee of $7.50 per dry ton and exceptional quality biosolids are exempt from a fee.

Exceptional Quality (EQ) Biosolids

DEQ received comment that distribution and marketing is not land application, and that it should follow that no NMP should be required for EQ material. The proposed requirement stated that biosolids meeting EQ standards may be distributed and marketed under a VPA or VPDES permit, and that nutrient management plans must be developed unless the EQ material: 1) is >90% solids (i.e. pelletized); or 2) is greater than 40% solids and has a C:N ratio greater than 25:1. DEQ also received comment that some biosolids compost and soil blends used for landscaping purposes would not meet the 25:1 C:N ratio and thus be subject to NMP requirements.

In response to these concerns, DEQ modified the NMP exemption to include material that is not used for the purpose of fertilizing agricultural operations.

If bulk EQ biosolids are land applied as a cake, a NMP is required and the distribution and marketing permit may include additional restrictions.

Staff Recommendation

After making a presentation on the above issues and answering any questions the Board may have, staff will be asking the Board for final approval of the proposed changes to the Fee, VPDES, and VPA regulations.

Attachments

A. Biosolids Technical Advisory Committee Members
B. Public Comments and Department Response to Comments
C. Detail of Changes Since Publication of Proposed
D. Project 1248: Amendment of Regulations Pertaining to Biosolids After Transfer from the Department of Health
    a. 9VAC25-20 Fees for Permits and Certificates
    b. 9VAC25-31 Virginia Pollutant Discharge Elimination System Permit Regulation
    c. 9VAC25-32 Virginia Pollution Abatement Permit Regulation

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